February 6, 2003

Via electronic submission

Honorable Michael K. Powell, Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Federal Communications Commission
Room 8-B201
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Ex Parte* Communication – CC Docket Nos. 01-338, 96-98, and 98-147**

Dear Chairman Powell and Commissioners:

Data Net Systems, L.L.C. is a certified competitive local exchange carrier ("CLEC"). We are writing to address matters of grave concern that are currently under your consideration concerning the local telecommunications competition Triennial Review. According to numerous public statements attributed to one or more Commissioners, the upcoming Triennial Review will potentially address theories on developing local competition that may curtail or even terminate the local competition efforts in which businesses and the government have invested immeasurable resources for nearly fifty years. In particular, the intensely focused efforts of the last fourteen years that have developed the first successful inroads in local competition are threatened with elimination through the heretofore rejected recommendations from the Regional Bell monopolies on how to most successfully develop local competition against them. Two matters are certain. The Commission's decision will affect the lives of hundreds of millions of Americans and will define this Commission and this government in history. Therefore, a review of some of the known facts is critical before reaching a determination of the future. The extensive historical record to develop local competition through facilities-based efforts clearly establishes that this approach alone cannot accomplish broad-based local competition. This is the basis for the three pronged approach established in the federal Telecommunications Act of 1996 ("Federal Act"), which approach must be sustained.

Under the Federal Act "a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network." The

Federal Act allows a carrier to provide service wholly through the leased facilities of the incumbent's network without any facilities–ownership requirement.[1]

The Regional Bell monopolies ask the Commission to eliminate local competition pursued through the Federal Act's authorized lease of end-to-end network facilities, the unbundled network elements platform ("UNE-P" or "platform"). In the three short years the platform has been available in limited parts of the United States, consumers of ten million lines have exercised their freedom of choice by electing to choose local phone service from other than the incumbent local exchange provider ("ILEC") when provided this opportunity through the UNE-P. These are primarily residential and small business consumers with relatively low volume telecommunications traffic that previously had no choice of providers in the local market.

With the boldness of little or no subterfuge, the Regional Bell Operating Companies ("RBOCs") request this Commission to terminate competitive services to the mass consumer market by eliminating the means to serve them, the UNE platform. Since it is the law of the land that use of the platform is authorized under the Federal Act, the RBOCs request that the Commission eliminate the heart on the loop-switch-transport-platform by eliminating the monopolies' provision of the switch to local competition. This accomplishes as a matter of fact what the RBOCs have already failed to do as a matter of law, prohibit the UNE-P.

The argument to eliminate the switch comes in a couple of flavors.[2] First, the monopolies argue that the Federal Act's design is to create facilities-based competition and the UNE-P stands as an obstacle to that development. Eliminate the platform and investors will build alternative facilities-based networks to compete locally. Secondly, the RBOCs argue that switches other than the incumbent LECs already exist within the LATAs, therefore it is not necessary for the ILECs to provide switches to CLECs. Neither argument withstands scrutiny on the known facts.

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[1] *AT&T Corporation v. Iowa Utilities Board,* 525 U.S. 366, 371, 392-3, 119 S.Ct. 721, 726, 736 (1999) (unanimous findings of the United States Supreme Court).

[2] It is important to note that the purported issue claimed by the RBOCs is whether the local switch is to be provided at all, not whether the RBOCs will provide the switch at a different price. The law of the land has already established that the price of the switch, if it is necessary to be provided, is to be based on TELRIC, which is the just and reasonable price as identified in the Federal Act. *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467, 122 S.Ct. 1646 (2002). Therefore, the RBOC claim must rest wholly on the theory that CLECs do not need to utilize the ILEC switch at all to provide local telephone service. If the switch is necessary, the price must be cost based (TELRIC).

At first blush, one asks why would incumbent monopolies produce the best regulatory design to compete successfully in taking away the monopolies' customers? Furthermore, if taking those customers totally off of the incumbents' facilities means that the monopolies would lose all revenues from servicing those customers, in contrast to the competitors leasing the incumbents' facilities and continuing significant contributions to the incumbents' sunk costs even if it were to lose the customer, why would the monopolies promote this pursuit if it would be more successful in creating local competition? Of course, the answer is obvious. There is extensive historical fact establishing that this approach is a barrier to entry, not an untried novel approach to opening the local market. The real question is why would regulators dictate this approach? That answer is also obvious, they would not. The numerous state commissions that have buried themselves in the complex details and evidence of the true facts surrounding local telecommunications have rejected the monopolies' case for what it is, a barrier to entry.

Attempts to develop local competition through facilities-based competitors is almost as old as telecommunications itself. When the Bell patents expired in 1893, numerous companies, including the giant Western Union Telegraph Company, rushed into the market to compete with AT&T, Ma Bell. Yet, the natural power of the incumbent network made attempts to develop competition unsuccessful. By 1913, the federal government and all but three states had passed acts regulating communications, including the Mann-Elkin Act of 1910 vesting interstate jurisdiction in the Interstate Commerce Commission. When the United States Department of Justice threatened to break-up the Bell monopoly on antitrust grounds, a compromise was reached in 1913, substituting regulation of the monopoly for the absence of a competitive marketplace. Bell found regulation preferable to antitrust action, open competition, nationalization, or the "hazards attendant upon duplication of exchange facilities".[3] Facilities-based competition was defeated despite the enormous investments sunk in the effort.

More recently, attempts at telephone competition began to reemerged in the 1950s. Beginning with customer premises equipment, it continued to evolve in the areas of interconnect equipment, long distance services, and local services. The renewed attempts to develop local competition predate the Federal Act, going back at least to 1989. Illinois and a number of other large states authorized and promoted the development of local competition as a matter of public policy. Pursuant to the Universal Telephone Service Protection Law of 1985, local exchange competition was authorized in Illinois commencing January 1, 1989. Public Act 84-1063, Section 13-405, 220 ILCS 5/13-405.

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[3] *A Legislative History of the Communications Act of 1934,* Max D. Paglin, Editor, 1989, New York, NY, Oxford University Press, pp. 25-30; *The Story of Telecommunications*, George P. Oslin, 1992, Macon, GA, Mercer University Press, pp. 250-265; *The Biggest Company on Earth: A Profile of AT&T*, Sonny Kleinfield, 1981, New York, NY, Holt, Rinehart and Winston, p. 8.

In Illinois, local competition began immediately upon authorization in 1989. Initial efforts to compete focused on facilities-based competition, since neither ubiquitous resale nor any form of leasing of the ILEC's network elements was yet available to competitors. In April, 1995, the Illinois Commerce Commission ("ICC") ordered Ameritech Illinois to make all services available for resale to certified CLECs.[4]

Over 300 CLECs had been certified in Illinois by the year 2000. Numerous attempts to break into the local market were being tried. Vast facilities-based attempts of companies such as Chicago Fiber Optics/ MFS Intelenet, Teleport, and others pursued the local market. Additionally, AT&T experimented with fixed wireless systems and spent billions of dollars to purchase cable TV operations in Illinois and other states. Through its cable outlets, AT&T invested in new technologies to convert its cable system to provide telecommunications services over those facilities. AT&T began marketing local telephone service through coaxial cable to its cable subscribers, through advertising, and even doing door-to-door marketing.[5]

An Illinois-headquartered company, Motorola, put together a consortium of companies to launched scores of satellites to establish its own facilities-based telecommunications system called Iridium. Yet Iridium's satellite venture only led it to the U.S. Bankruptcy Court. On August 1, 2000, the Chicago Tribune reported that all attempts for Iridium to emerge from bankruptcy failed, with the result of

> "a 'de-orbiting' procedure, in which all 86 of Iridium's communications satellites will re-enter the earth's atmosphere and burn up. . . . The satellite-communications venture has been a financial disaster, having burned through nearly $5 billion from investors."

While these efforts at facilities-based local competition have been vigorously pursued by the new entrants to local telecommunications, Verizon (formerly GTE North), the nation's largest facilities-based local exchange company, with over 100 years of local

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[4] *Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois ("Ameritech's Customers First Plan")*, ICC Docket Nos. 94-0096/0117/0146/0301 Consol., April 7, 1995, pp. 66-67.

[5] Before acquiring Ameritech, SBC acquired SNET, the ILEC for Connecticut, and its cable operations. SNET planned to use hybrid fiber coax to provide full-service telephony, data, and cable TV throughout the state. According to TR Daily, the telecom trade newsletter, on August 11, 2000 SBC filed with the Connecticut Department of Public Utility Control for permission to discontinue its cable operations there. SBC's Connecticut subsidiary said it found that hybrid fiber coax was not "suitable for delivering ubiquitous, full-service telephony" and added that SNET "cannot financially support the deployment of a video-only (hybrid fiber coax) network". Now, after years of effort and billions of dollars in investment, AT&T also has shed its cable-telephony operations in its recent spin-off to Comcast.

telephone experience, and ready access to capital markets, surrounds the SBC Ameritech Illinois local service territory, without making any attempt to offer local telecommunications to SBC Ameritech customers. Similarly, SBC Ameritech, Illinois' largest facilities-based local service provider, also with over a century of experience in providing local telephone services, and with access to billions in capital, sits on the doorstep of the Verizon territory without making any attempt to cross the threshold to offer Verizon customers local telecommunications services.[6]

Meanwhile, resale efforts spread after the Illinois Commerce Commission order of April, 1995. Numerous CLECs, from large providers such as AT&T and MCI, to a host of smaller new entrants, engaged in extensive efforts and expenditures to establish themselves in the resale local market.

Despite these efforts, penetration was seriously restrained in the local business market, with little penetration in the small business market. Local residential competition was negligible. After 11 years of facilities-based local competition and almost 5 years of resale local competition, CLECs had an aggregated 8.09% share of the local business market and 0.20% share of the local residential market as of the end of 1999.[7] [8] [9]

On June 26, 1996 the Illinois Commerce Commission ordered Ameritech Illinois to file a tariff within 30 days for the nation's first unbundled network elements platform.[10] However, Ameritech Illinois did not provide a UNE-P line until October, 2000. After an 18 month investigation of the Illinois General Assembly on the lack of development in local competition in Illinois, the Illinois legislature passed the Telecommunications Rewrite of 2001 codifying past ICC orders, including SBC Ameritech's obligation to provide UNE-P, and enhancing the enforcement provisions of the Illinois Public Utilities Act.[11]

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[6] Clearly, simply the combination of facilities, local exchange experience, capital, and proximity do not constitute the formula for local competition. The new entrants, and meeting their substantial needs, are the essence of the mix for developing local competition.

[7] Illinois Senate Committee on Environment and Energy, Telecommunications Informational Hearing, Testimony of Chairman Richard L. Mathias of the Illinois Commerce Commission ("Testimony of ICC Chairman Mathias"), March 23, 2000.

[8] No UNE-P lines were provisioned in Illinois before October, 2000.

[9] For purposes of comparison, it is of note that SBC has recently announced that it obtained a 2.5% share of the consumer retail long distance market in California after only 19 business days. SBC Investor Update, January 28, 2003, 2002 4Q Earnings.

[10] *LDDS Communications, Inc. d/b/a LDDS Metromedia Communications Petition for a Total Wholesale Network Service Tariff from Illinois Bell Telephone Company d/b/a/ Ameritech Illinois and Central Telephone Company Pursuant to Section 13-505.5 of the Illinois Public Utilities Act*, ICC Docket Nos. 95-0458/0531 Consol., June 26, 1996.

[11] Public Act 92-0022, effective June 28, 2001.

With the revitalized incentives provided by the General Assembly, SBC Ameritech began to comply with its obligations to open the local exchange facilities to its competitors. Once SBC Ameritech began providing the UNE-P, the 11 year-old barrier to local market entry broke. By the end of the third quarter 2002, slightly over a year after the Illinois Rewrite, the CLECs' aggregate share of the SBC Ameritech local residential market rose to 11.0% using the UNE-P alone, with an additional 4.7% of the local business market utilizing UNE-P.[12]

The evidence shows that the UNE-P does not prevent the pursuit of facilities-based competition. The evidence further establishes that reliance on facilities-based and resale efforts alone are unsuccessful in bringing competition to the majority of consumers.

The second RBOC argument proposes that switches other than the incumbent LECs already exist within the LATA, and therefore it is not necessary for the ILECs to provide switches to CLECs to have local competition. This similarly transparent argument barely needs reply. If the mere existence of a switch other than the ILEC's was sufficient to establish a competitive local market, then local telephone service would have been competitive since the 19th century. Switches other than the monopolies have been available virtually since the beginning of telecommunications. However, it is the network of switches that creates the monopoly characteristics of the network, not the ownership of a switch.

If the existence of three switches in a single LATA was sufficient to create a competitive local market, the marketplace would long ago have shown rampant competition, before the Federal Act was ever enacted. As noted, facilities for local phone service, including switches, have been installed and provided in Illinois since 1989. The Illinois Commerce Commission ordered Ameritech Illinois to provide CLECs with unbundled loops and subloops in 1995,[13] what later would be called UNE-L. Yet, the aggregate CLEC local residential market share was only 0.20% almost five years later.[14] Since UNE-P was not available in Illinois during this period, it could not have served as a disincentive to investment in UNE-L based local competition. However, local competition through UNE-L did not develop despite the aggressive support of the Illinois Commerce Commission.

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[12] The UNE-P Fact Report, January, 2003, PACE Coalition.
[13] *Ameritech's Customers First Plan, supra*, pp. 38-49, April 7, 1995.
[14] Testimony of ICC Chairman Mathias, *supra*, March 23, 2000.

SBC Ameritech has over 300 switches in Illinois[15] to provide local telephone service. If SBC Ameritech needs 300 switches to provide local service, how can a CLEC provide competing service using one, two, or three switches? If the over 297 other switches that SBC Ameritech uses for local service are unnecessary, then why for 80 years did this Commission or the Illinois Commerce Commission make ratepayers pay for these excessive costs through Commission findings that expenditures on these 300 switches were just and reasonable costs for inclusion in establishing rates? The fact is the record before this Commission and before the various state commissions establishes the necessity of such a network of switches to provide local service.

Such a local network is the foundation as to why long distance competition was able to develop beginning in the 1960s, while local competition is still attempting to establish itself. Long distance service only needed a single local switch or a few local switches ("Points of Presence") to aggregate traffic in the state of origin and trunk it interstate. Yet, even long distance was dependent on the local exchange monopoly's intricate local network of switches to originate and terminate the call locally. This intricate switching network could not be duplicated by the long distance carrier, which remained dependent on the local monopoly. This was the whole basis for the AT&T divestiture in 1984.[16] The presence of a competing carrier's switch does not establish an ability to provide competitive local exchange service. It is the existence of the extensive network of local switches that impairs the ability of a new entrant to provide competition in the local telephone market. This fact is well established.

All three of the local market entry strategies found in the Federal Act have been, and are being, pursued in Illinois. Facilities-based local competition has had the most experience, being utilized for 14 years. Many other states have made similar pursuit of local competition and observed the same market forces. The facts establish that the marketplace evinces the necessity of all three approaches to develop a competitive local market. This is why state regulatory commissions, such as the Illinois Commerce Commission, that have been immersed in the hard facts and details of hearings conducted with discovery and the taking of evidence, subjected to cross-examination, have advised this Commission of the need to maintain all three approaches, including the UNE-P, to accomplish the Federal Act's goal of developing local competition.

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[15] *Illinois Commerce Commission on its Own Motion Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements ,Transport and Termination of Traffic*, ICC Docket Nos. 96-0486/0569 Consol., Ameritech Illinois Ex. 3.1 (Palmer), Schedule 4, page 1 of 1.

[16] *United States v. American Telephone & Telegraph Company*, 552 F.Supp. 131 (D.C.D.Ct. 1982) ("*Modification of Final Judgment*"), aff'd *sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983).

The necessity of the local monopoly to make the local switches available to competing carriers is firmly established by the historical facts of record. The need for the unbundled network elements platform to develop broad-based local telephone competition has also been established through facts, not theories. Purported theories that the UNE-P is unnecessary to develop local competition, or that the UNE-P is an obstacle to facilities-based competition, fail even to qualify as theories, since the marketplace has already experienced such scenarios and rejected their hypothesis. The various state commissions know these facts from first hand experience in their own localities. That is why they have advised this Commission not to disturb the provisioning of the unbundled network elements platform, for it is necessary to accomplish the goal of local telephone competition. Without UNE-P, many CLECs, including Data Net Systems, a small business entrepreneur, would cease to be able to provide local telephone services and would have to close its business..

Local telephone competition has never been successfully accomplished anywhere, anytime. Through the auspices of the three approaches of using a carrier's own facilities, the leasing of network elements, and resale, our country is closer to accomplishing this goal than ever before. The growth of local competition, and consumer choices, where the UNE-P is provided is irrefutable. The marketplace should be given the opportunity to decide the best approach to develop local competition in each of the various localities. A better system for ultimately determining what works cannot be devised. It is the foundation of our whole federal system.

Respectfully submitted,

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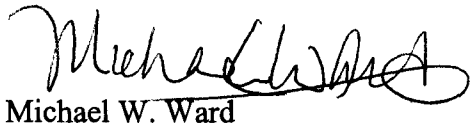

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